**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| **In the Matter of** | **)** | **CG Docket No. 02-278** |
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| **The Request for a Declaratory** | **)** | |
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| **Ruling From the American** | **)** | |
| | **)** | |
| **Teleservices Association Inc.** | **)** | |

## COMMENTS OF JOE SHIELDS IN REGARDS TO THE PETITION OF THE AMERICAN TELESERVICES ASSOCIATON INC. FOR A DECLARATORY RULING ON PREEMPTION OF THE NEW JERSEY TELEMARKETING LAW

I respectfully submit these comments to the Commission in reply to the Petition for a Declaratory Ruling on Preemption of the New Jersey Telemarketing Law filed by the American Teleservices Association Inc. (CG Docket No. 02-278, DA 04-3185A) with the Commission.

In the June 26th, 2003 adoption of the Commission Report and Order the Commission discussed at length the issue of consistency with State and FTC do not call rules[1]. The Commission concluded that a single national do not call database was the most efficient and least confusing to consumers and telemarketers and that the Commission would work with the states to ensure harmony with the various state do not call data bases and the federal do not call database. Apparently this has occurred as envisioned by the Commission.

The issue the American Teleservices Association (hereinafter "ATA") raises addresses an alleged inconsistency between the New Jersey state law and federal law on the established business relationship definitions.

As a threshold matter, the constitutional principles of preemption are designed to avoid conflicting regulation commonly referred to as "Conflict Preemption" or Congressional intent to occupy the field commonly referred to as "Field Preemption". Conflict preemption exists when compliance with both federal and state regulations is impossible. Field preemption exists when Congress left no room for States to supplement federal regulation.

In the ATA matter before the Commission there is no basis for preemption as no conflict exists between the state and federal statute. The New Jersey law is in harmony with the

[1] FCC Report and Order, FCC 03-153A1, Sec. 5, Para 74-85

federal statute and merely places additional clarifications and restrictions on telephone solicitations[2] directed to the forum state of New Jersey. This is consistent with Congressional intent to create a floor (not a ceiling) for those that want to engage in telemarketing. Furthermore, Congress in passing the Telephone Consumer Protection Act (hereinafter "TCPA") decided not to occupy the field and used language within the statute to specifically permit the States to supplement federal regulation[3]. The Congressional intent together with the language within the TCPA is clear and concise: less restrictive state laws are in conflict with Congressional intent and are preempted but a more restrictive state law is not preempted.

The Commission in the June 26th, 2003 adoption of the Commission Report and Order acknowledged that the States have been successful in enforcement of State laws on telephone solicitations that cross state lines:

> "National Association of Attorneys General (NAAG) contends that states have historically enforced telemarketing laws, including do-not-call rules, within, as well as across, state lines pursuant to ''long-arm'' statutes. According to NAAG, these state actions have been met with no successful challenges from telemarketers. We note that such ''long-arm'' statutes may be protected under section 227(f)(6) which provides that ''nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such state.'' 47 U.S.C. 227(f)(6). Nothing that we do in this order prohibits states from enforcing state regulations that are consistent with the TCPA and the rules established under this order in state court."

Given the above I question the motive of the ATA in requesting the declaratory ruling since the New Jersey law is consistent with the TCPA. Telemarketers would certainly use a Commission declaratory ruling that preempts New Jersey telemarketing law to challenge every properly brought State court claim brought by a State or a consumer. Apparently this is the telemarketing industries motive - to use a confusing Commission declaratory ruling to declare that ***all*** State telemarketing laws are preempted by the TCPA.

There is no confusion between State and Federal laws regulating telemarketing activity – this is simply another alarmist statement by the ATA. It is as substantiated as the doomsayer statement about the millions of lost jobs the Federal do-not-call list would cause. A telemarketer can comply with all State and Federal telemarketing laws by simply complying with the most restrictive law.

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[2] *"The Division believes the Act and Rules will work in concert with the FCC and FTC regulations to afford the greatest protection to New Jersey consumers without undue burden to telemarketers who do business in New Jersey."* New Jersey Register, Volume 36, Number 10, May 17, 2004, Rule Adoption, Summary of Public Comments and Agency Responses

[3] 47 USC § 227 (e) and 47 USC § 227 (f)(6)

Lisa DeFalco, outgoing chairwoman of the ATA commenting on the Supreme Court dismissing without comment the constitutional challenge of the Federal do-not-call list filed by the ATA: "I feel like we've won," DeFalco said. "The industry has never had an organized voice and message." This “organized voice” is apparent in the three (3) declaratory ruling requests filed with the Commission by the telemarketing industry. It is also apparent from the State Preemption letter filed by the Direct Marketing Association (hereinafter “DMA”) with the Commission. The DMA in their letter dated October 4th, 2004 has even gone so far as to threaten the Commission with declaratory ruling requests on all fifty (50) State telemarketing laws! Obviously the telemarketing industry is conspiring together and using this “organized voice” to attack all State telemarketing laws in a venue where the other side is not represented.

I would also like to point out that a Declaratory Ruling is an inappropriate venue to decide the issue. The FCC should, as is general practice, allow such issues to be decided in adversarial proceedings in the courts. In such court cases, both sides of the issue will be represented by interested parties, where in this action, only the ATA's position is represented.

Furthermore, to answer the questions raised by the ATA, multiple issues of construction and application of New Jersey law are critical to preemption analysis. Expertise in New Jersey law lies best with the New Jersey courts, who should be the ones to decide such questions. Just as federal courts sitting in diversity often defer questions of application and interpretation of state law to the state courts, the FCC should decline to decide this issue at this time, so the issue can be decided first by the New Jersey courts. Such a decision would likely explain and decide the relevant issues of construction and application of the state laws so that the FCC will have a more accurate and authoritative basis for application of preemption doctrines to the state law. Then and only then, should the FCC review that decision.

Consequently, I respectfully request that the Commission refrain from issuing a declaratory ruling in the American Teleservices Association matter until such time as the matter is properly represented and fully presented before the Commission.

Respectfully submitted,

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